80-705

No. .....

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

October Term, 1980

RODELL GRANT, et al.,
Petitioners,

vs.

OWENS-CORNING FIBERGLAS CORPORATION

and

TEAMSTERS LOCAL NO. 541

and

INSULATION PRODUCTION WORKERS
LOCAL UNION NO. 1,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals, Tenth Circuit, in affirming the District Court's judgment, erred:

I. In holding that Respondent Insulation Production Workers Local Union No. 1, as a co-statutory agent of the bargaining unit, owed no duty of fair representation to the Petitioners as individual union members of the statutory bargaining unit.

II. In holding that the Respondent Teamsters Local No. 541 violated no duty of fair representation by failing to investigate and thereby discover the existence of an amendment to the preceding Collective Bargaining Agreement for its inclusion in the grievance procedure as bearing on the question of the seniority of the Petitioners.

III. In granting summary judgment where there are unresolved questions of material fact.

IV. In the alternative, in not allowing the Petitioners to amend the pleadings and allege that their statutory bargaining agents, Respondents Teamsters Local No. 541 and Insulation Production Workers Local Union No. 1, breached their duty of fair representation in failing to include in the questioned Collective Bargaining Agreement seniority rights that were previously acquired that expressly allowed and gave to the Petitioners the seniority rights now in question.

PARTIES

The parties to this proceeding in the court of appeals were as follows:

Petitioners:

Rodell Grant	Leroy Holmes
Benny Shorts	Alfred Jordan
William Stringer	R. C. Ricks, Jr.
Kenneth Lacy	Barnes Parker

Respondents:

Owens-Corning Fiberglas Corporation
Teamsters Local No. 541
Insulation Production Workers Local Union No. 1

TABLE OF CONTENTS

Questions Presented for Review I
Parties II
Opinions Below 1
Jurisdiction 2
Statute Involved 2
Statement of the Case 3
Basis for Federal Jurisdiction in Court of First Instance 6
Reasons for Granting the Writ 7
Conclusion 10

Appendix—

A—Opinion of the Tenth Circuit "Not for Routine Publication A1
B—Opinion of the District Court (unreported) A12
C—Written notice of lay-off from Owens A23
D—Written Amendment of July 29, 1971, to Collective Bargaining Agreement A26

TABLE OF AUTHORITIES

CASES

Beriault v. Local 40, Super Cargoes and Checkers, Etc., 340 F.Supp. 155, *aff'd in part and rev'd in part*, 501 F.2d 258 (9th Cir. 1974), 445 F.Supp. 1287 (D.Ore. 1978) 9-10
Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953) 7
Goclowski v. Penn Cent. Trans. Co., 571 F.2d 747 (3rd Cir. 1977) 9
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) 8

International Bro. of Teamsters, Chauffeurs, Etc. v. N.L.R.B., 587 F.2d 1176 (D.C. 1978) 8
Milstead v. International Bro. of Teamsters, Etc., 585 F.2d 232 (6th Cir. 1978) 8
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) 8-9
Robesky v. Qantas Airways Limited, 583 F.2d 1083 (9th Cir. 1978) 7
Steele v. Louisville & N.R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) 7
Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 843 (1967) 7

STATUTES AND RULES

29 U.S.C. 185, § 301 6
Constitution of the State of Kansas, Art. 15, § 12 6
Rule 15(b), F.R.C.P. 9
K.S.A. 60-223 6

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INSULATION PRODUCTION WORKERS
LOCAL UNION NO. 1,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Tenth Circuit, rendered in these proceedings on June 12, 1980.

OPINIONS BELOW

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT. The opinion of the court below in this case (App. A, p. A1) has been designated "Not for Routine Publication."

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. The opinion of the United States District Court for the District of Kansas is unreported. (App. B, p. A12).

JURISDICTION

The judgment of the United States Court of Appeals, Tenth Circuit, was entered June 12, 1980. Petition for rehearing was denied on August 1, 1980. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Section 301 of the National Labor Relations Act, ch. 120, 61 Stat. 156, 29 U.S.C. § 185, provides:

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

In this Petition, the Respondent Owens-Corning Fiberglas Corporation will be referred to as "Owens"; the Respondent Teamsters Local No. 541 will be referred to as "Teamsters"; and Respondent Insulation Production Workers Local Union No. 1 will be referred to as "Workers." The various collective bargaining agreements will be referred to as "Collective Bargaining Agreement", which will incorporate the years.

The Petitioners at all times were employees at the Owens-Corning Fiberglas Plant, located in Kansas City, Kansas. The plant is divided into four departments: Production, Maintenance, Powerhouse and Warehouse. The bargaining unit consists of several unions, which in-

clude both the Respondents Teamsters and Workers. By November 25, 1974, all the Petitioners had job bid to be transferred from the Production Department to what are described as non-craft jobs in the Maintenance Department. On November 25, 1974, all of the Petitioners were furloughed, or laid off, from their jobs with the Respondent Owens, pursuant to a written Notice, a copy of which is attached hereto and incorporated herein. (App. C, p. A23). One of the Petitioners, Barnes Parker, had filed a written grievance on behalf of himself and all other Petitioners, on the basis that their furlough was in violation of the seniority clause in the Collective Bargaining Agreement in existence between 1972 through 1975. The principal issue of the grievance is whether the Petitioners should be allowed to exercise their previous seniority in the Production Department and, thereby, "bump" or replace workers in the Production Department with less seniority than themselves. All parties stipulated that if the seniority right existed the Petitioners would not have been furloughed.

The grievance was processed by the Respondent Teamsters through all steps specified in the Collective Bargaining Agreement, but even though requested by Petitioners Parker, Respondent Teamsters refused to file for arbitration.

Prior to the 1972-1975 Collective Bargaining Agreement, the previous agreement, from 1969 through 1972, allowed the Petitioners to choose whether they wished to be represented by the Workers or the Teamsters. During the existence of the previous Collective Bargaining Agreement of 1969-1972, the Respondent Workers, through their Business Agent, in April, 1971, entered into an oral amendment to the Collective Bargaining Agreement, which was later set forth in writing on July 29, 1971, a copy of which is attached hereto and incorporated herein (App. D, p. A26), and which granted Petitioners the exact seniority

right that they claimed through the filing of the written grievance. The in-question 1972-1975 Collective Bargaining Agreement had two major changes that affect the current litigation: (1) the Workers did not maintain co-representation of the non-craft workers in the Maintenance Department (i.e. the Petitioners), and (2) the written amendment of July 29, 1971, was not expressly included in the Collective Bargaining Agreement. Discovery in the litigation reveals that the Workers (1) did not disclose the existence of the amendment to any individual member of the bargaining unit, or (2) did not disclose the existence of the amendment to any co-statutory agent of the bargaining unit.

In previous opinions by the District Court of Appeals, it was stressed that Petitioner Parker had no complaints as to how the Teamsters or Workers had treated him in the grievance process. However, this opinion was expressed by Petitioner Parker in his deposition on the 11th of November, 1977, whereas the discovery of the written amendment was not until December 9, 1977. Petitioner Parker had also testified in his deposition that he had transferred to the Maintenance Department only after being assured by his Teamster Business Agent that he would have the right to transfer back to the Production Department in case of a furlough in the Maintenance Department. While the current Collective Bargaining Agreement allowed for the exclusive representation of the Petitioners by the Teamsters in the grievance procedure, the Respondent Workers was aware of the layoffs in the Maintenance Department, due to the fact that they represented other classifications of workers in the Maintenance Department who were also laid off and, in addition, the Respondent Workers received notice of all written grievances filed. In spite of receiving notice of the grievance concerning the seniority question, the Workers made no attempt to notify

either the Petitioners personally or its fellow statutory agent, the Teamsters, of the existence of the written amendment of July 29, 1971.

The Teamsters, thereby, failed to discover the existence of the previous amendment for its presentation as an aid in interpreting the seniority clause in the grievance process.

While the aforementioned side agreement (App. D, p. A26) is couched in terms of its dues paying members, Kansas is a right-to-work state, which does not require compulsive membership in a statutory bargaining unit.*

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Petitioners originally filed their action for breach of the Collective Bargaining Agreement against Respondent Owens and an action against Respondents Teamsters and Workers in the Wyandotte County District Court as a class action, pursuant to K.S.A. 60-223, on August 17, 1977. On September 13, 1977, Respondent Owens filed a petition for removal, pursuant to 29 U.S.C. 185. On September 14, 1978, the United States District Court for the District of Kansas issued a memorandum and order granting Respondents summary judgment, which was filed of record on November 2, 1978. Petitioners then filed a notice of appeal for the Tenth Circuit on November 30, 1978. A petition for rehearing was denied on August 1, 1980.

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*Constitution of the State of Kansas, Art. 15, § 12. *Membership or nonmembership in labor organizations.* No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Directly Conflicts With the Previously Enunciated Principles in the Court's *Steele v. Louisville & N.R. Co.*, *Ford Motor Company v. Huffman*, and *Vaca v. Sipes* Rulings, That the Duty of Fair Representation Is Owed to All Individual Members of the Statutory Bargaining Unit.

The Court previously ruled in the case of *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); in the case of *Ford Motor Company v. Huffman*, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); and later in the case of *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 843 (1967), that in a Section 301 suit the duty of fair representation extends to all members (i.e. individuals) of the bargaining unit. The District Court and the Court of Appeals in their decisions found that the Respondent Workers owed no duty to the Petitioners. The Petitioners do not claim that the Respondent Workers owed them the duty of being co-represented by Respondents Workers and Teamsters at the grievance procedure. However, Petitioners do claim that the Respondent Workers' duty of fair representation would require them, when their knowledge is exclusive, to disclose that information to the co-statutory agent or to the Petitioners, as to the existence of all previous amendments to collective bargaining agreements as an interpretative aid of current seniority rights in a grievance procedure. *Robesky v. Qantas Airways Limited*, 583 F.2d 1083 (9th Cir. 1978). While the issue can be raised that the Petitioners did not directly request the services of the Workers, due to the fact of the nondisclosure, Petitioners were not aware of the amendment of July 29, 1971. In the Court of Appeals for the District of Columbia, it has been recently held that jointly certified

unions in a bargaining unit owe a general duty of fair representation to all workers in the unit and not merely its own members. *International Bro. of Teamsters, Chauffeurs, Etc. v. N.L.R.B.*, 587 F.2d 1176 (D.C. 1978).

II. The Decision of the Court of Appeals Directly Conflicts With the Previous Principles Enunciated in the Court's *Hines v. Anchor Motor Freight* Ruling.

The Court, in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), held that a Plaintiff states a cause for breach of a union's duty of fair representation when the union fails to adequately investigate the charges against a union member and presents no favorable evidence at representation.

There is no dispute that the Respondent Teamsters did not discover (i.e. investigate) any surrounding circumstances in relationship to any previous wording or interpretation of the current Collective Bargaining Agreement by its failure to discover the written amendment to the preceding Collective Bargaining Agreement (App. D, p. A26), which expressly provided for the seniority rights claimed by the Petitioners. The duty of fair representation requires that the bargaining agent investigate the applicability of the collective bargaining agreement in regard to claimed seniority rights. See *Milstead v. International Bro. of Teamsters, Etc.*, 585 F.2d 232 (6th Cir. 1978).

III. The Court of Appeals Erred in Granting Summary Judgment, Due to Unresolved Questions of Material Fact and the Ambiguity of the Collective Bargaining Agreement That Must Be Resolved at Trial.

This Court previously ruled in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7

L.Ed.2d 458 (1962), that summary judgment should be entered only when pleadings, depositions, evidence and admissions filed in a case show no genuine issue as to any material fact, and that the record will be reviewed in a light most favorable to the party opposing the motion for summary judgment. The instant case involves a conflict and ambiguity in the Collective Bargaining Agreement itself; involves past practices where some workers were allowed to transfer, as the Petitioners now claim the right to so do; further, involves the previous written amendment (App. D, p. A26); and involves the testimony of Petitioner Parker that transfer was made only after consulting with a business agent and being assured of having the right to be able to transfer back in case of a layoff.

Where there is an ambiguity in the contract and where past practices have allowed the right that the Petitioners claim, there is ambiguity and conflict and a question of material fact that must be resolved at trial. *Goclowski v. Penn Cent. Trans. Co.*, 571 F.2d 747 (3rd Cir. 1977).

IV. In the Alternative, the Court of Appeals Erred in Not Remanding the Case to Allow Petitioners to Amend Their Petition, Pursuant to Rule 15(b) of the Federal Rules of Civil Procedure.

If the Court should agree with the Court of Appeals that the Petitioners do not have the claimed seniority right, the Court should remand the case, to allow Petitioners to amend their petition, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, to allege a breach of the duty of fair representation by the Respondents Teamsters and Workers in failing to properly represent Petitioners in negotiating the in-question Collective Bargaining Agreement of 1972-1975. See *Beriault v. Local 40, Super Cargoes and Checkers, Etc.*, 340 F.Supp. 155, *aff'd in part and*

rev'd in part, 501 F.2d 258 (9th Cir. 1974), 445 F.Supp. 1287 (D.Ore. 1978). The claimed seniority right of the Petitioners existed in the previous Collective Bargaining Agreement (1969-1972) and was incorporated in the Collective Bargaining Agreement of 1975-1978. The only time the claimed right allegedly did not exist was during the period for which the Petitioners seek such right. Due to the fact that the Workers did not disclose the existence of the 1971 amendment to the Petitioners or their statutory bargaining agent, the Teamsters, it is clear that this express written amendment was not included in the current 1972-1975 Collective Bargaining Agreement.

As the inclusion of the amendment in the Collective Bargaining Agreement would be detrimental to the Respondent Workers by the fact that its own dues-paying members would be displaced by the Petitioners exercising their seniority rights, there is the inference of bad faith on the part of the Respondent Workers.

CONCLUSION

Certiorari should be granted, due to the important question presented as to the duty owed by all statutory agents (i.e. unions) of the bargaining unit to the individual members. The breaches of the duty of fair representation in the instant case by co-statutory agents go to the most basic right of the individual member, seniority. One breach of the duty of fair representation occurred when one co-statutory agent acquired a seniority right by a written amendment to the Collective Bargaining Agreement and failed to disclose that right to the individual members or its fellow statutory agent. The second breach of the duty of fair representation occurred in the processing of a grievance based upon the exact seniority question, when

the other co-statutory agent, failed to discover the existence of that written seniority amendment for its presentation in the grievance procedure as an indication of past practices and an interpretative aid.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed August 1, 1980)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM - June 12, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

No. 78-2041
(D.C. No. 77-2234)

RODELL GRANT, BENNY SHORTS, WILLIAM STRINGER, KENNETH LACY, LEROY HOLMES, ALFRED JORDAN, R. C. RICKS, JR., and BARNES PARKER,
Plaintiffs-Appellants,

vs.

OWENS-CORNING FIBERGLAS CORPORATION, TEAMSTERS, and INSULATION PRODUCTION WORKERS,
Defendants-Appellees.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

NOT FOR ROUTINE PUBLICATION

(Filed June 12, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-2041

RODELL GRANT, BENNY SHORTS, WILLIAM STRINGER, KENNETH LACY, LEROY HOLMES, ALFRED JORDAN, R. C. RICKS, JR., and BARNES PARKER,
Plaintiffs-Appellants,

v.

OWENS-CORNING FIBERGLAS CORPORATION, TEAMSTERS LOCAL NO. 541, and INSULATION PRODUCTION WORKERS LOCAL UNION NO. 1,
Defendants-Appellees.

Appeal From the United States District Court
For the District of Kansas
(D.C. No. 77-2234)

Ronald L. Gold, Shawnee Mission, Kansas, for Plaintiffs-Appellants.

Albert J. Yonke (Michael G. Newbold of Yonke, Shackelford & Arnold, P.C., Kansas City, Missouri, and George A. Groneman, Kansas City, Kansas, with him on the brief), for Defendant-Appellee Teamsters Local No. 541.

Chris Mitchell of Constangy, Brooks & Smith, Birmingham, Alabama (Edward Katze of Constangy, Brooks & Smith, Atlanta, Georgia, and N. Jack Brown of Boddington & Brown, Kansas City, Kansas, with him on the brief), for Defendant-Appellee Owens-Corning Fiberglas Corporation.

Robert S. Fousek of Manning and Fousek, Kansas City, Missouri, and Timothy Evans of Evans and Mullinix, Kansas City, Kansas, for Defendant-Appellee Insulation Production Workers Local Union No. 1.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

BARRETT, Circuit Judge.

Appellants, all former employees of Owens-Corning Fiberglas Corporation (Owens), appeal an order and judgment denying their motion for summary judgment and granting motions for summary judgment in favor of Owens, Teamsters Local No. 541 (Teamsters) and Insulation Production Workers Local No. 1 (Workers).

Owens has owned and operated a plant in Kansas City, Kansas, since prior to 1953. During this time Teamsters and Workers have represented Owens' employees. The plant is divided into four departments: Production, Maintenance, Powerhouse and Warehouse. Workers represented employees engaged in production work and Teamsters represented non-craft employees in the Maintenance Department. Employees could, within the parameters of the collective bargaining agreements in effect at any given time, job bid from one department to another.

Seniority rights between the various departments were set forth within the collective bargaining agreements negotiated and agreed upon over the years. From 1953 to 1957, the collective bargaining agreements included the following provision relative to seniority rights of employees between departments:

> If an employee of the Production Department or Warehouse Department has been transferred to a job in a different department through job bidding, and he is thereafter laid off for lack of work or through no fault of his own, *he will be credited with the seniority he had at the time he transferred and be permitted to return to work on the lowest paid job in his former department, providing that there are employees working on such jobs who have less seniority* than the employee had at the time he was transferred to the other department.
>
> [Emphasis supplied].

In 1957 the provision was amended. Thereafter, from 1957 to 1972, it provided:

> If an employee of the Production or Warehouse Department has been transferred to a job in a different department through job bidding, and he is thereafter laid off for lack of work or through no fault of his own, he will be credited with the seniority he had at the time he transferred and be permitted to return to work on the beginning job in his former department, providing that there are employees working on such jobs who have less seniority than the employee had at the time he was transferred to the other department. In the Production Department the beginning job shall be the Handyman with the least amount of department seniority. *This section shall not apply to transfers from the Production Department to the Maintenance Department.*
>
> [Emphasis supplied].

During the April 16, 1969 to April 16, 1972 contract, Workers did enter into a side agreement on July 29, 1971, with Owens amending this provision. The side agreement

provided, in effect, that Production Department employees who transferred to other departments between April 16, 1969 and April 16, 1972 could retain their previously accumulated Production Department seniority if they met the qualifications set forth in Article X, Section 14(b) of the collective bargaining agreement which required, *inter alia,* "such an employee will continue to hold the seniority he had at the time of his promotion providing he remains a dues paying member of . . . Workers . . ."

In 1972 the provision was again changed and from 1972 to 1975, it provided:

> If an employee of the Production or Warehouse Department has been transferred to a job in a different department through job bidding, and he is thereafter laid off for lack of work or through no fault of his own, he will be credited with the seniority he had at the time he transferred and be permitted to return to work on the beginning job in his former department, providing that there are employees working on such jobs who have less seniority than the employee had at the time he was transferred to the other department. In the Production Department the beginning job shall be the Handyman with the least amount of department seniority. *This section shall only apply to transfers from the Production Department or Warehouse Department to the Maintenance Department while working as a 4th, 3rd or 2nd class trainee.*
>
> [Emphasis supplied].

Prior to November 25, 1974, the appellants herein had job bid from the Production Department to non-craft jobs in the Maintenance Department. On November 25, 1974, the appellants were furloughed, or laid off, pursuant to a written notice by Owens in conjunction with an overall

workforce reduction at the Kansas City plant due to adverse economic and business conditions.

Within the written notice of furlough, which form had been in existence and use at Owens for a number of years, was the following:

> If you have previous service in a department other than the one from which you are being furloughed, you may be eligible to work in that department, depending on the seniority you had at the time you left that department. You may contact the Personnel Department to determine your eligibility.

Appellants attempted to gain re-employment within the Production Department following receipt of the notice of furlough. Owens, while admitting that each of the appellants had more seniority than their equivalent number working within the Production Department who were not furloughed, nevertheless refused to allow appellants to "bump" back into the Production Department inasmuch as none of the appellants were qualified as "4th, 3rd, or 2nd class trainees".

At the time of the furloughs none of the appellants were dues paying members of Workers and none of them discussed their furloughs with Workers or requested Workers to file a grievance on their behalf.

On December 9, 1974, several weeks after being furloughed, appellants, with the assistance of Teamsters' representatives, filed a grievance. They contended that Owens had violated the 1972-1975 collective bargaining agreement by refusing to allow them to exercise their Production Department seniority rights to "bump" back into the Production Department. Although the grievance was denied by Owens at each step of the grievance procedure, Teamsters processed appellants' grievance through Step 3 and

Corporate Review, the final step in the contractual grievance procedure short of arbitration. Thereafter, when Teamsters refused to process the grievance to arbitration because it had found nothing in the contract to support appellants' grievances and because it believed it could not prevail in arbitration, appellants filed the instant suit.

Within their complaint, appellants alleged that Owens had breached the collective bargaining agreement in effect on November 25, 1974, i.e., the 1972-1975 agreement; that Workers and Teamsters had breached the 1972-1975 agreement; and that Workers and Teamsters had breached their duty of fair representation owed to appellants.

Following the completion of discovery, which included depositions taken by both sides, the exchange of interrogatories, and requests for admissions, appellants moved for partial summary judgment against Owens; and appellees, Owens, Workers and Teamsters moved for summary judgment. In a Memorandum Opinion and Order dated September 14, 1978, the District Court denied appellants' motion for partial summary judgment, granted appellees' motions for summary judgment and dismissed the case. A Journal Entry consistent with the Memorandum and Order was thereafter filed by the District Court on November 2, 1978.

Within the Memorandum and Order the trial court found, *inter alia*: between 1969 and 1974 each of the plaintiffs (appellants) transferred through a job bidding procedure from positions in the Production Department to non-craft positions in the Maintenance Department; on November 25, 1974, Owens furloughed each of the plaintiffs due to adverse business or economic conditions; plaintiffs were not allowed to avoid furlough by "bumping" less senior employees in their former department (Production) since under the relevant collective bargaining agree-

ment (1972-1975) such rights accrued only to transfers "while working as a 4th, 3rd, or 2nd class trainee", and none of the plaintiffs met this requirement; plaintiffs initiated grievance proceedings through all stages short of arbitration and their grievance was found to be without merit at every level; a union breaches its duty of fair representation to its employees when its conduct to its members is "arbitrary, discriminatory, or in bad faith, Vaca v. Sipes, 386 U.S. 171 (1967); a breach of duty of fair representation does not occur merely because a union decides that a particular grievance lacks merit or takes a good faith position contrary to that of some of its members, e.g. Humphrey v. Moore, 375 U.S. 335 (1964)"; Teamsters is entitled to summary judgment when, as here, it conclusively established that: (1) plaintiffs' grievance was processed in a timely manner; (2) Teamsters continually aided plaintiffs in the preparation and presentation of their grievance; (3) Teamsters explained it would not proceed to arbitration "because the grievance was not supported by the language of the agreement and . . . [it] . . . felt that it would lose in any arbitration proceeding"; and (4) plaintiffs' only complaint with Teamsters was their disagreement with its position; with respect to Workers: (1) at the time the grievance was filed none of the plaintiffs belonged to Workers or was paying dues to it, (2) plaintiffs did not discuss their grievance with Workers or request that it participate in any grievance proceeding in their behalf, and (3) Workers did not in any way participate in the handling of plaintiffs' grievance.

The Court also found: Count II, the allegation of alleged breach of Union's contractual duties of fair representation, must be judged by *Vaca v. Sipes, supra*, under which it fails to state an actionable claim; the findings that Union did not breach their duties of fair representation (Count III) and their contractual duties (Count II)

of representation necessarily "dispose of the claims advanced in Count One to the effect that the employer breached the terms of the applicable collective bargaining agreement"; and that plaintiffs' motion for summary judgment on Count One is "completely and utterly without merit and deserves no comment beyond the simple observation that the plaintiffs' theories of recovery are incomprehensible to the court and supported by no law of which this court has been made aware".

Appellants contend the trial court erred: (1) in granting summary judgment on questions of fact to be decided by the jury; (2) ruling that Workers owed no duty of fair representation to appellants; (3) granting summary judgment to appellees on the basis that appellants failed to exhaust prerequisite collective bargaining procedures; (4) and (5) not granting appellants partial summary judgment as to their seniority rights under the 1972-1975 collective bargaining agreement (or, as an alternative remedy, remand by this Court to allow appellants to amend their pleadings and allege that the Unions failed to properly represent them in negotiating the 1972-1975 agreement); and (6) in granting summary judgment upon requests for admissions that should not have been deemed admitted.

We must initially define the general parameters governing our review. Summary judgment must be denied unless a moving party demonstrates his entitlement to it beyond a reasonable doubt. *Harsha v. United States*, 590 F.2d 884 (10th Cir. 1979); *Stevens v. Barnard*, 512 F.2d 876 (10th Cir. 1975). Summary judgment should not be granted when different inferences can be drawn from conflicting affidavits and depositions, *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980); *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978);

and a court must construe the facts in a manner most favorable to the nonmovant. *Buell Cabinet Company, Inc. v. Sudduth*, 608 F.2d 431 (10th Cir. 1979). Although a court of appeals may affirm a summary judgment if any proper ground exists in support thereof, *Lindsey v. Dayton-Hudson Corporation*, 592 F.2d 1118 (10th Cir. 1979), still a reviewing court must examine summary judgments in a light most favorable to the party opposing the motion and all ambiguities and disagreements must be resolved in favor of that party. *Webb v. Allstate Life Insurance Co.*, 536 F.2d 336 (10th Cir. 1976); *Mustang Fuel Corporation v. Youngstown Sheet and Tube Company*, 516 F.2d 33 (10th Cir. 1975).

Applying these standards, we hold the trial court did not err in granting appellees summary judgment.

A union breaches its duty of fair representation when its conduct toward a member of the designated unit is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes, supra; Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978), *cert. granted*, 439 U.S. 892 (1978)[1]; *Cox v. C. H. Masland & Sons, Inc.*, 607 F.2d 138 (5th Cir. 1979). A union, however, does not breach its duty of fair representation merely because it settles a grievance short of arbitration. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976) citing to *Vaca, supra.* Furthermore, whereas a union is obligated to fairly represent its membership it does not have a ministerial duty to satisfy each member's demands at all costs. *Freeman v. O'Neal Steel, Inc.*, 609 F.2d 1123 (5th Cir. 1980). Thus, a breach of duty of fair representation by a union is not established merely by proof that the underlying grievance

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1. *Certiorari* granted limited to Question 3 presented by the petition.

was meritorious, *Woods v. North American Rockwell Corporation*, 480 F.2d 644 (10th Cir. 1973).

None of the appellants herein deposed or otherwise stated that Teamsters processed their grievances in an arbitrary, discriminatory manner, or in bad faith. On the contrary, appellant Barnes Parker, who filed the grievance involved herein on behalf of himself and the other appellants, deposed that he had no complaints relative to the manner in which Teamsters had treated him. No other evidence was offered contrariwise. Furthermore, as indicated above, Teamsters did not breach its duty of fair representation merely because it opted not to take the grievances to arbitration. This is particularly true, when, as here, appellants could not "bump" back into the Production Department under the terms of the 1972-1975 collective bargaining agreement. A union is not obligated to secure the enforcement of seniority rights of some of its numbers in direct derogation of a controlling collective bargaining agreement. *Patterson v. Tulsa Local No. 513*, 446 F.2d 205 (10th Cir. 1971), *cert. denied*, 405 U.S. 976 (1972).

In view of the uncontested, dispositive facts surrounding the grievances herein, and the trial court's careful consideration of same within the parameters of the controlling law, we hold that the court properly granted Unions' and Owens' motions for summary judgment.

We have carefully considered appellants' remaining allegations of error. We hold that they are, individually and collectively, without merit.

AFFIRMED.

APPENDIX B

(Filed September 14, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION
No. 77-2234

RODELL GRANT, BENNY SHORTS, WILLIAM STRINGER, KENNETH LACY, LEROY HOLMES, ALFRED JORDAN, R. C. RICKS, JR., and BARNES PARKER,
Plaintiffs,

v.

OWENS-CORNING FIBERGLAS CORPORATION, TEAMSTERS, and INSULATION PRODUCTION WORKERS,
Defendants

MEMORANDUM AND ORDER

This case comes now before the court for determination of the respective motions for summary judgment of each of the parties herein. This proceeding purports to be a class action on behalf of all employees of defendant Owens-Corning Fiberglas Corporation who were laid off or furloughed in alleged violation of the seniority provisions of a collective bargaining agreement in effect from April 16, 1972, through April 16, 1975. Count One of the plaintiffs' complaint alleges the defendant employer's breach of said collective bargaining agreement. Count Two alleges that the defendant unions, Teamsters Local

541 and Insulation Production Workers Local No. 1, breached contractual duties of representation owed to the plaintiffs. Count Three avers that said unions breached their duties of fair representation to the plaintiffs. Upon review of these claims in light of the relevant law, the court finds that the defendants are entitled to prevail on their motions for summary judgment.

The court's entry of summary judgment is premised upon numerous facts which are deemed to be conclusively established as true under Rule 36 of the Federal Rules of Civil Procedure as a result of the plaintiffs having failed to respond or object to requests for admissions. Said requests for admissions, 60 in number, were served on the plaintiffs on February 15, 1978. Plaintiffs' only response thereto was to file a motion to compel the production of authenticated copies of collective bargaining agreements from 1953, 1955, 1957, 1960, 1963, and 1966, and to obtain an extension of time for answer. No extension of time was granted by the court, and the plaintiffs have never filed any answers or objections to the requests in question. The court cannot discern any manner in which the 1953-1966 collective bargaining agreements might be relevant to the instant motions. Therefore, the sufficiency of the plaintiffs' "motion to compel" as a response to the requests for admissions need not be considered.

The relevant undisputed facts are as follows: Between 1969 and 1974, each of the named plaintiffs transferred through a job bidding procedure from positions in the production department to non-craft positions in the Owens-Corning maintenance department. On November 25, 1974, Owens-Corning furloughed the plaintiffs due to adverse business or economic conditions. The plaintiffs were not allowed to avoid furlough by "bumping" less senior employees in their former department (production) because

under the relevant provisions of the 1972-75 collective bargaining agreement, such rights accrued only to transfers from production to maintenance "while working as a 4th, 3rd or 2nd class trainee." None of the plaintiffs met this requirement. The plaintiffs, represented by Barnes Parker, instituted grievance proceedings which were processed by the defendant Teamsters union through all stages short of arbitration. Their grievance was found to be without merit at every level of the proceedings. The plaintiffs therefore initiated the instant action in an effort to vindicate their alleged bumping rights.

In the absence of a finding that a union has breached its duty of fair representation towards its members, suit against the employer for breach of a collective bargaining agreement will be barred if the contractually established grievance procedures have not been exhausted prior to the initiation of litigation against the employer. Stated otherwise, a finding that the union breached its duty of fair representation is a prerequisite to the maintenance of any action against the employer in the circumstances present here. *Vaca v. Sipes*, 386 U.S. 171 (1966). Accordingly, the court's attention must first turn to examination of the respective motions for summary judgment of the defendant unions.

The test of a breach of the duty of fair representation is whether the union's conduct toward its members was "arbitrary, discriminatory, or in bad faith." While a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, an individual employee has no absolute right to have his grievance taken to arbitration and the fact that his grievance was meritorious does not in itself prove a breach of the union's duty. *Vaca, supra*. Further, a breach of the duty of fair representation does not occur merely because a union decides

that a particular grievance lacks merit or takes a good faith position contrary to that of some of its members. *E.g., Humphrey v. Moore,* 375 U.S. 335 (1963).

In this case, the court must conclude without hesitation that the defendant unions are entitled to summary judgment on Count Three of the complaint, which alleges a breach of their respective duties of fair representation. The conclusively established facts concerning Teamsters Local 541 are that (1) the plaintiffs' grievance was processed in a timely manner; (2) the Union, through its business agent, continually aided the plaintiffs in the preparation and presentation of their grievance; (3) the Union explained to the plaintiffs that it was not proceeding to arbitration because the grievance was not supported by the language of the contract and the Union felt that it would lose in any arbitration proceedings; and (4) the plaintiffs' only complaint about the Union was their disagreement with its interpretation of the contract. With reference to the Insulation Production Workers Local Union, the record is clear that (1) at the time the grievance was filed, no plaintiffs belonged to IPW or were paying dues to IPW; (2) at no time did any of the plaintiffs discuss their grievance with IPW or request that IPW participate in any grievance proceedings on their behalf; and (3) IPW did not in any way participate in the handling of the plaintiffs' grievance. Under no view of the relevant law can these facts be said to give rise to an actionable claim for breach of the Union's duties of fair representation. Plaintiffs have failed to demonstrate a single plausible theory of liability or a genuine issue of material fact that would justify allowing this litigation to proceed to trial. Accordingly, the defendant unions are entitled to summary judgment on Count Three.

Count Two alleges that the unions breached their *contractual* duties of representation of the plaintiffs. The

plaintiffs have not brought to the court's attention any pertinent contracts, let alone any contractual provisions, that might give rise to the liability sought to be imposed here. Indeed, at the time of oral argument on these motions on September 7, 1978, plaintiffs' counsel conceded that Count Two, if not indistinguishable from Count Three, must be judged by reference to the identical *Vaca* standards that governed Count Three. Accordingly, the court must conclude that Count Two fails to state an actionable claim and that the defendant unions are entitled to prevail on their motions for summary judgment on the claims advanced therein.

These findings necessarily dispose of the claims advanced in Count One to the effect that the employer breached the terms of the applicable collective bargaining agreement. The plaintiffs' motion for summary judgment on Count One is completely and utterly without merit and deserves no comment beyond the simple observation that the plaintiffs' theories of recovery are incomprehensible to the court and supported by no law of which the court has been made aware. The defendant Owens-Corning is entitled to summary judgment because the plaintiffs, having failed to exhaust the prerequisite collective bargaining grievance procedures, are precluded by the factual admissions recited above from stating an actionable claim that their failure to exhaust was occasioned by a breach of the Unions' respective duties of fair representation.

IT IS THEREFORE ORDERED that the motions for summary judgment of the defendants Teamsters Local 541, Insulation Production Workers Local Union No. 1, and Owens-Corning Fiberglas Corporation be and hereby are sustained, and that the plaintiffs' motion for summary judgment be and hereby is overruled. Counsel for defen-

dants shall prepare, circulate, and forward for the court's approval and signature a Journal Entry of Judgment reflecting the holdings of the foregoing Memorandum and Order.

Dated this 14th day of September, 1978, at Kansas City, Kansas.

/s/ Earl E. O'Connor
United States District Judge

(Filed November 2, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

NO. 77-2234

RODELL GRANT, BENNY SHORTS, WILLIAM STRINGER, KENNETH LACY, LEROY HOLMES, ALFRED JORDAN R. C. RICKS, JR., and BARNES PARKER,
Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS CORPORATION, TEAMSTERS and INSULATION PRODUCTION WORKERS,
Defendants,

JOURNAL ENTRY

Now on this 14th day of September, 1978, comes on for decision the respective motions for summary judgment of each of the parties herein, the Court having heard argument thereon, on the 7th day of September, 1978.

Plaintiffs' complaint purports to be a Class Action on behalf of all employees of defendant Owens-Corning Fiberglas Corporation who were laid off or furloughed in alleged violation of the seniority provisions of the Collective Bargaining Agreement in effect from April 16, 1972 through April 16, 1975. Count I of plaintiffs' complaint alleges the defendant employer's breach of said Collective Bargaining Agreement. Count II alleges that the defendant Unions, Teamsters Local #541 and Insulation Production Workers Local #1, breached contractual duties of

representation "to the plaintiffs". Count III avers that said Unions breached their duties of their representation to the plaintiffs.

The Court finds that the motions for summary judgment of the respective defendants should be sustained and that plaintiffs' motion for summary judgment should be overruled, in accordance with the following findings:

1. That based upon the relevant undisputed facts reflected by the pleadings herein, between 1969 and 1974 each of the named plaintiffs transferred through a job bidding procedure from positions in the production department to noncraft positions in the Owens-Corning maintenance department, and that on November 25, 1974, Owens-Corning furloughed the plaintiffs due to adverse business or economic conditions, and plaintiffs were not allowed to avoid furlough by "bumping" less senior employees in their former department (production) because of the relevant provisions of the 1972 - 1975 Collective Bargaining Agreement.

2. That none of the plaintiffs met the exception to the foregoing, since rights accrued only to transfers from production to maintenance "while working as fourth, third or second class trainee", but that plaintiffs, represented by Barnes P. Parker instituted grievance proceedings which were processed by defendant Teamsters Union through all stages short of arbitration.

3. That plaintiffs' grievance was found to be without merit at every level of the proceedings.

4. That plaintiffs' grievance was processed timely by defendant Teamsters Local #541, who continually aided plaintiffs in the preparation and presentation of their grievance.

5. That Teamsters Local #541 explained to plaintiffs, prior to the institution of these proceedings, that it was not proceeding to arbitrate, because the grievance was not supported by the language of the contract and that the Union felt that it would lose in any arbitration proceedings.

6. That plaintiffs' only complaint as to defendant Teamsters Local #541 was that said Union disagreed with plaintiffs' interpretation of the contract.

7. That at the time the hereinbefore identified grievance was filed, plaintiffs did not belong to Insulation Production Workers Local Union (hereinafter referred to as IPW), nor were they paying dues to IPW.

8. That at no time did any of the plaintiffs discuss their grievances with IPW or request IPW to participate in any grievance proceedings on their behalf.

9. IPW did not in any way participate in the handling of plaintiffs' grievance.

10. That plaintiffs' counsel concedes in open Court that Count II, if not indistinguishable from Count III must be judged by reference to identical standards.

11. That there is no manner in which the 1953-1966 Collective Bargaining Agreements could be relevant to the instant motions.

12. Numerous facts are deemed to be conclusively established as true under Rule 36 of the Federal Rules of Civil Procedure as a result of the plaintiffs' having failed to respond or object to requests for admissions. Said requests for admissions, sixty in number, were served on the plaintiffs on February 15, 1978. Plaintiffs' only response thereto was to file a motion to compel the production of authenticated copies of collective bargaining agreements from 1953, 1955, 1957,

1960, 1963, and 1966, and to obtain an extension of time for answer. No extension of time was granted by the Court, and the plaintiffs have never filed any answers or objections to the requests in question.

The Court finds that plaintiffs have failed to demonstrate a single plausible theory of liability or a genuine issue of material fact that would justify allowing this litigation to proceed to trial. The plaintiffs have not brought to the Court's attention any pertinent contracts, let alone any contractual provisions, that might give rise to the liability sought to be imposed here. On the other hand, plaintiffs' motion for summary judgment is completely and utterly without merit and deserves no comments beyond the simple observation that the plaintiffs' theory of recovery are incomprehensible and not supported by any law of which this Court is aware. Under no view of the relevant law can the facts support an actual claim for breach of the defendant Unions' duties of fair representation or defendant Owen-Corning's duties as an employer.

IT IS THEREFORE BY THE COURT ORDERED that plaintiffs' motion for summary judgment should be and the same is hereby overruled, and that the motions for summary judgment of the defendants Teamsters Local #541, Insulation Production Workers Local Union #1, and Owens-Corning Fiberglas Corporation should be and are hereby sustained.

/s/ Earl E. O'Connor
United States District Judge

APPROVED:

/s/ Refused Signature
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By /s/ John J. Manning
Attorneys for Defendant Insulation
Production Workers Union Local #1

APPENDIX C

OWENS-CORNING FIBERGLAS CORPORATION

Kansas City, Kansas

TO: B. E. Parker CLOCK #1661 SHIFT 4

SUBJECT: REDUCTION IN FORCE (FURLOUGH)

This is to notify you of your furlough due to conditions beyond our control which demand a reduction of our working force. Included in this letter is information you will need during the furlough and concerning your recall to work when it becomes available.

WHEN:

The furlough is to be effective Monday, November 25, 1974 at 7:00 A.M. Between now and the effective time of the furlough you will work according to the schedule of the regularly established shift to which you are assigned. You are eligible for overtime call-in, if needed, up to the time of the furlough.

HOW LONG:

It is impossible to estimate the duration of your furlough. As work becomes available every person furloughed will be recalled in accordance with his seniority and no others will be hired until those furloughed have been recalled.

IN THE MEANTIME:

You should report to the Employment Security Division to file claim for unemployment compensation and to register for available work. The Kansas Office is located at 552 State Avenue, Kansas City, Kansas. The Missouri Office is at 1411 Walnut, Kansas City, Missouri.

In accordance with the terms of our Company-Union Contract, you are responsible for keeping the Company ad-

vised of your current address and telephone number. To comply with Article X, Section 1-A, you must, when furloughed, leave on file your address and telephone number. To accomplish this, fill out the attached *Furlough Address Form* and leave it with your Foreman or with the Guard in the Gatehouse. Your recall will be sent to the address you show on this form.

INSURANCE:

While on furlough you are limited to a period of ninety days as the maximum you may carry your group insurance. Your coverage will continue without payment; however, if you have insured dependents, you must pay their monthly premium to the Insurance Office not later than the 6th of each month.

You are urged to contact the Insurance Office immediately to determine your status. If you do not contact the Insurance Office, we will assume that you are not interested in the continuation of insurance coverage for your dependents.

CREDIT UNION:

Those having an account in the Credit Union are urged to contact the Credit Union Office.

WHEN RECALLED:

Upon receipt of instructions to return to work, you must notify the Company within three days, excepting week-ends and holidays, from the date your recall is received if you intend to return to work. You must report to work, after checking with the Local Union Office and the Personnel Office, within fifteen days from the date of your recall.

NOTE:

If you have previous service in a department other than the one from which you are being furloughed, you may be

eligible to work in that department, depending upon the seniority you had at the time you left that department. You may contact the Personnel Department to determine your eligibility.

FINAL PAY:

Your final pay will be ready at the Gatehouse at 3:00 P.M. Friday November 29, 1974.

UNION MEMBERSHIP:

You are urged to contact your Local Union Office for the purpose of taking a withdrawal card or otherwise arranging to take care of monthly dues. This will protect your membership and may save you the cost of monthly dues while on furlough.

Very truly yours,

/s/ W. R. Vail
W. R. Vail
Employment Manager

WRV/slm

APPENDIX D

EXHIBIT "A"

INSULATION PRODUCTION WORKERS

101 E. Armour Blvd., Kansas City, Missouri

1 Kansas City, Mo
July 29, 71

William K. Browne, Personnel Director
Owens-Corning Fiberglas Corp.
P. O. Box 15139, Fairfax Station
Kansas City, Kansas

Dear Bill:

On April 1, 1971, the Company and the Insulation Production Workers' Local Union #1 discussed and agreed that employees, who may bid from the Production department to jobs in other departments in the Kansas City plant, may avail themselves of the same provisions as employees going outside the bargaining unit as provided for in Article X, Section 14/b of the Agreement. This letter is to verify the results of the meeting of April 1, 1971, and to fulfill Article XX, Section 2 of the Agreement.

This will affect only those employees who have made this move during the term of the present contract, April 16, 1969 to April 16, 1972.

Sincerely,

/s/ Harry D. Hutton, Jr.
Harry D. Hutton, Jr.
Business Manager

HDH:1
cc: W. K. Browne
W. J. Stack

Signed: /s/ W. K. Browne
William K. Browne
Owens-Corning Fiberglas Corp.